

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

11 GENENTECH, INC.,) Case No: 5:10-CV-2037-LHK (PSG)
12 Plaintiff,)
13 vs.)
14 THE TRUSTEES OF THE UNIVERSITY OF) **STIPULATED PROTECTIVE ORDER**
15 PENNSYLVANIA, a Pennsylvania non-profit) **FOR LITIGATION INVOLVING**
corporation,) **PATENTS, HIGHLY SENSITIVE**
16 Defendant.) **CONFIDENTIAL INFORMATION**
17) **AND/OR TRADE SECRETS**
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1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production of
 3 confidential, proprietary, or private information for which special protection from public disclosure
 4 and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly,
 5 the parties hereby stipulate to and petition the court to enter the following Stipulated Protective
 6 Order. The parties acknowledge that this Order does not confer blanket protections on all
 7 disclosures or responses to discovery and that the protection it affords from public disclosure and use
 8 extends only to the limited information or items that are entitled to confidential treatment under the
 9 applicable legal principles. The parties further acknowledge, as set forth in Section 14.4, below, that
 10 this Stipulated Protective Order does not entitle them to file confidential information under seal;
 11 Civil Local Rule 79-5 sets forth the procedures that must be followed and the standards that will be
 12 applied when a party seeks permission from the court to file material under seal.

13 2. DEFINITIONS

14 2.1 Challenging Party: a Party or Non-Party that challenges the designation of
 15 information or items under this Order.

16 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how
 17 it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule
 18 of Civil Procedure 26(c).

19 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel
 20 (as well as their support staff).

21 2.4 Designated House Counsel: House Counsel who seek access to “HIGHLY
 22 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in this matter.

23 2.5 Designating Party: a Party or Non-Party that designates information or
 24 items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL” or
 25 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

26 2.6 Disclosure or Discovery Material: all items or information, regardless of the
 27 medium or manner in which it is generated, stored, or maintained (including, among other things,
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1 testimony, transcripts, and tangible things), that are produced or generated in disclosures or
 2 responses to discovery in this matter.

3 2.7 Expert: a person with specialized knowledge or experience in a matter
 4 pertinent to the litigation who (1) has been retained by a Party or its counsel to serve as an expert
 5 witness or as a consultant in this action, (2) is not a past or current employee of a Party or of a
 6 Party's competitor, and (3) at the time of retention, is not anticipated to become an employee of a
 7 Party or of a Party's competitor.

8 2.8 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information
 9 or Items: extremely sensitive "Confidential Information or Items," disclosure of which to another
 10 Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less
 11 restrictive means.

12 2.9 House Counsel: attorneys who are employees of a party to this action.
 13 House Counsel does not include Outside Counsel of Record or any other outside counsel.

14 2.10 Non-Party: any natural person, partnership, corporation, association, or
 15 other legal entity not named as a Party to this action.

16 2.11 Outside Counsel of Record: attorneys who are not employees of a party to
 17 this action but are retained to represent or advise a party to this action and have appeared in this
 18 action on behalf of that party or are affiliated with a law firm which has appeared on behalf of that
 19 party.

20 2.12 Party: any party to this action, including all of its officers, directors,
 21 employees, consultants, retained experts, and Outside Counsel of Record (and their support staffs).

22 2.13 Producing Party: a Party or Non-Party that produces Disclosure or
 23 Discovery Material in this action.

24 2.14 Professional Vendors: persons or entities that provide litigation support
 25 services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and
 26 organizing, storing, or retrieving data in any form or medium) and their employees and
 27 subcontractors.

1 2.15 Protected Material: any Disclosure or Discovery Material that is designated
 2 as "CONFIDENTIAL," or as "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY."

3 2.16 Receiving Party: a Party that receives Disclosure or Discovery Material
 4 from a Producing Party.

5 3. SCOPE

6 The protections conferred by this Stipulation and Order cover not only Protected
 7 Material (as defined above), but also (1) any information copied or extracted from Protected
 8 Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any
 9 testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected
 10 Material. However, the protections conferred by this Stipulation and Order do not cover the
 11 following information: (a) any information that is in the public domain at the time of disclosure to a
 12 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a
 13 result of publication not involving a violation of this Order, including becoming part of the public
 14 record through trial or otherwise; and (b) any information known to the Receiving Party prior to the
 15 disclosure or obtained by the Receiving Party after the disclosure from a source who obtained the
 16 information lawfully and under no obligation of confidentiality to the Designating Party. Any use of
 17 Protected Material at trial shall be governed by a separate agreement or order.

18 4. DURATION

19 Even after final disposition of this litigation, the confidentiality obligations imposed
 20 by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court
 21 order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all
 22 claims and defenses in this action, with or without prejudice; and (2) final judgment herein after the
 23 completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,
 24 including the time limits for filing any motions or applications for extension of time pursuant to
 25 applicable law.

26 5. DESIGNATING PROTECTED MATERIAL

27 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
 28 Party or Non-Party that designates information or items for protection under this Order must take

1 care to limit any such designation to specific material that qualifies under the appropriate standards.
 2 To the extent it is practical to do so, the Designating Party must designate for protection only those
 3 parts of material, documents, items, or oral or written communications that qualify – so that other
 4 portions of the material, documents, items, or communications for which protection is not warranted
 5 are not swept unjustifiably within the ambit of this Order.

6 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
 7 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
 8 unnecessarily encumber or retard the case development process or to impose unnecessary expenses
 9 and burdens on other parties) expose the Designating Party to sanctions.

10 If it comes to a Designating Party's attention that information or items that it
 11 designated for protection do not qualify for protection at all or do not qualify for the level of
 12 protection initially asserted, that Designating Party must promptly notify all other parties that it is
 13 withdrawing the mistaken designation.

14 5.2 Manner and Timing of Designations. Except as otherwise provided in this
 15 Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,
 16 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so
 17 designated before the material is disclosed or produced.

18 Designation in conformity with this Order requires:

19 (a) for information in documentary form (e.g., paper or electronic documents, but
 20 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing Party
 21 affix the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
 22 ONLY” to each page that contains protected material. If only a portion or portions of the material
 23 on a page qualifies for protection, the Producing Party also must clearly identify the protected
 24 portion(s) (e.g., by making appropriate markings in the margins) and must specify, for each portion,
 25 the level of protection being asserted.

26 A Party or Non-Party that makes original documents or materials available for
 27 inspection need not designate them for protection until after the inspecting Party has indicated which
 28 material it would like copied and produced. During the inspection and before the designation, all of

1 the material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL –
 2 ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants
 3 copied and produced, the Producing Party must determine which documents, or portions thereof,
 4 qualify for protection under this Order. Then, before producing the specified documents, the
 5 Producing Party must affix the appropriate legend (“CONFIDENTIAL” or “HIGHLY
 6 CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) to each page that contains Protected Material.
 7 If only a portion or portions of the material on a page qualifies for protection, the Producing Party
 8 also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the
 9 margins) and must specify, for each portion, the level of protection being asserted.

10 (b) for testimony given in deposition or in other pretrial or trial proceedings, that
 11 the Designating Party identify on the record, before the close of the deposition, hearing, or other
 12 proceeding, all protected testimony and specify the level of protection being asserted. When it is
 13 impractical to identify separately each portion of testimony that is entitled to protection and it
 14 appears that substantial portions of the testimony may qualify for protection, the Designating Party
 15 may invoke on the record (before the deposition, hearing, or other proceeding is concluded) a right
 16 to have up to 21 days to identify the specific portions of the testimony as to which protection is
 17 sought and to specify the level of protection being asserted. Only those portions of the testimony
 18 that are appropriately designated for protection within the 21 days shall be covered by the provisions
 19 of this Stipulated Protective Order. Alternatively, a Designating Party may specify, at the deposition
 20 or up to 21 days afterwards if that period is properly invoked, that the entire transcript shall be
 21 treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

22 Parties shall give the other parties notice if they reasonably expect a deposition,
 23 hearing or other proceeding to include Protected Material so that the other parties can ensure that
 24 only authorized individuals who have signed the “Acknowledgment and Agreement to Be Bound”
 25 (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a deposition
 26 shall not in any way affect its designation as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
 27 ATTORNEYS’ EYES ONLY.”

28 Transcripts containing Protected Material shall have an obvious legend on the title

page that the transcript contains Protected Material, and the title page shall be followed by a list of all pages (including line numbers as appropriate) that have been designated as Protected Material and the level of protection being asserted by the Designating Party. The Designating Party shall inform the court reporter of these requirements. Any transcript that is prepared before the expiration of a 21-day period for designation shall be treated during that period as if it had been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety unless otherwise agreed. After the expiration of that period, the transcript shall be treated only as actually designated.

(c) for information produced in some form other than documentary and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”. If only a portion or portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portion(s) and specify the level of protection being asserted.

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party's right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of confidentiality at any time. Unless a prompt challenge to a Designating Party's confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice

1 must recite that the challenge to confidentiality is being made in accordance with this specific
 2 paragraph of the Protective Order. The parties shall attempt to resolve each challenge in good faith
 3 and must begin the process by conferring directly (in voice to voice dialogue; other forms of
 4 communication are not sufficient) within 14 days of the date of service of notice. In conferring, the
 5 Challenging Party must explain the basis for its belief that the confidentiality designation was not
 6 proper and must give the Designating Party an opportunity to review the designated material, to
 7 reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the
 8 chosen designation. A Challenging Party may proceed to the next stage of the challenge process
 9 only if it has engaged in this meet and confer process first or establishes that the Designating Party is
 10 unwilling to participate in the meet and confer process in a timely manner.

11 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
 12 intervention, the Designating Party shall file and serve a motion to retain confidentiality under Civil
 13 Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21 days of the
 14 initial notice of challenge or within 14 days of the parties agreeing that the meet and confer process
 15 will not resolve their dispute, whichever is earlier.¹ Each such motion must be accompanied by a
 16 competent declaration affirming that the movant has complied with the meet and confer
 17 requirements imposed in the preceding paragraph. Failure by the Designating Party to make such a
 18 motion including the required declaration within 21 days (or 14 days, if applicable) shall
 19 automatically waive the confidentiality designation for each challenged designation. In addition, the
 20 Challenging Party may file a motion challenging a confidentiality designation at any time if there is
 21 good cause for doing so, including a challenge to the designation of a deposition transcript or any
 22 portions thereof. Any motion brought pursuant to this provision must be accompanied by a
 23 competent declaration affirming that the movant has complied with the meet and confer
 24 requirements imposed by the preceding paragraph.

25 The burden of persuasion in any such challenge proceeding shall be on the
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27 ¹ It may be appropriate in certain circumstances for the parties to agree to shift the burden to move on the Challenging
 28 Party after a certain number of challenges are made to avoid an abuse of the process. The burden of persuasion would
 remain on the Designating Party.

1 Designating Party. Frivolous challenges and those made for an improper purpose (e.g., to harass or
 2 impose unnecessary expenses and burdens on other parties) may expose the Challenging Party to
 3 sanctions. Unless the Designating Party has waived the confidentiality designation by failing to file
 4 a motion to retain confidentiality as described above, all parties shall continue to afford the material
 5 in question the level of protection to which it is entitled under the Producing Party's designation
 6 until the court rules on the challenge.

7. **ACCESS TO AND USE OF PROTECTED MATERIAL²**

8. 7.1 **Basic Principles.** A Receiving Party may use Protected Material that is
 9 disclosed or produced by another Party or by a Non-Party in connection with this case only for
 10 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
 11 disclosed only to the categories of persons and under the conditions described in this Order. When
 12 the litigation has been terminated, a Receiving Party must comply with the provisions of section 15
 13 below (FINAL DISPOSITION).

14 Protected Material must be stored and maintained by a Receiving Party at a location
 15 and in a secure manner³ that ensures that access is limited to the persons authorized under this Order.

16 7.2 **Disclosure of “CONFIDENTIAL” Information or Items.** Unless otherwise
 17 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
 18 disclose any information or item designated “CONFIDENTIAL” only to:

19 (a) the Receiving Party's Outside Counsel of Record in this action, as well as
 20 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the
 21 information for this litigation and who have signed the “Acknowledgment and Agreement to Be
 22 Bound” that is attached hereto as Exhibit A;

23 (b) the officers, directors, and employees (including House Counsel) of the
 24 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed
 25 the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

26 ² Documents and information previously reviewed and produced by either party pursuant to the previous stipulated
 27 protective order need not be re-labeled.

28 ³ It may be appropriate under certain circumstances to require the Receiving Party to store any electronic Protected
 Material in password-protected form.

(c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A) and (2) as to whom the procedures set forth in paragraph 7.4(a)(1), below, have been followed;

(d) the court and its personnel;

(e) court reporters and their staff, professional jury or trial consultants, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(f) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Stipulated Protective Order.

(g) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES

ONLY” Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

(a) the Receiving Party's Outside Counsel of Record in this action, as well as employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A;

(b) Designated House Counsel of the Receiving Party⁴ (1) who has no involvement in competitive decision-making, (2) to whom disclosure is reasonably necessary for this litigation, and (3) who has signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);⁵

(c) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary for this litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4(a)(1), below, have been followed;

(d) the court and its personnel;

(e) court reporters and their staff, professional jury or trial consultants,⁶ and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A); and

(f) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

⁴ Designated House Counsel who may access "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" information under this provision are limited to the five (5) in-house attorneys as previously identified and agreed to by the parties. The identified and agreed to attorneys are as follows: Sean Johnston, Gary Loeb, Laura Storto, Mark Jackson, and Atulya Agarwal for Genentech; and Lee Dobkin, Wendy White, Kate Donohue, Robert Firestone, and Robert Terrell for the University of Pennsylvania.

⁵ As to Sean Johnston, the General Counsel of Genentech, and Lee Dobkin, the Deputy General Counsel of the University of Pennsylvania, such Designated House Counsel may view, regardless of whether such materials have been designated “Highly Confidential – Attorneys’ Eyes Only” or contain such Protected Information, (i) all motions, memoranda, and briefs filed in this Action, including all drafts of such motions, memoranda and briefs that a party intends to file (but not any exhibits thereto that have been designated as “Highly Confidential – Attorneys’ Eyes Only” by the Designating Party or that contain the Designating Party’s Protected Information, absent prior written consent of the Designating Party), and (ii) all expert reports, and all drafts of expert reports that a party intends to serve, prepared for use in this Action (but not any exhibits cited in or appended thereto that have been designated “Highly Confidential – Attorneys’ Eyes Only” by the Designating Party or that contain the Designating Party’s Protected Information, absent prior written consent of the Designating Party). No party shall include Protected Information in any drafts of motions, memoranda, briefs, or expert reports without a good faith and reasonable belief that such material will appear in the final filed or served version, or for the sole purpose of disclosing Protected Information to Sean Johnston or Lee Dobkin.

⁶ With respect to mock jurors, the following restrictions apply to Protected Information designated as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only”: (i) mock jurors may not take possession of any such information but may only be presented with such information orally or through visual aids such as would be used at trial; and (ii) no mock juror shall participate in any mock jury exercise involving the disclosure of “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” information designated by another party or non-party if, at the time thereof, he or she is employed by, or consults with, a “Prohibited Entity” of such party or non-party. A “Prohibited Entity” means any of up to ten (10) entities identified by a party or non-party. Each party shall provide a list in writing of Prohibited Entities to the other party within thirty (30) days following the date of entry of this Order. Any non-party shall provide a list in writing of Prohibited Entities to the parties within thirty (30) days from the date of its first production of documents or things designated as Protected Information under this Order. Thereafter, no additional Prohibited Entities may be identified by a party or non-party absent agreement of the parties or order of the Court. The mock jurors must also sign the “Acknowledgment and Agreement to Be Bound” (Exhibit A) or a simplified version of such Undertaking approved by the parties.

1 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY
 2 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or Items to Experts.

3 (a) (1) Unless otherwise ordered by the court or agreed to in writing by the
 4 Designating Party, a Party that seeks to disclose to an Expert (as defined in this Order) any
 5 information or item that has been designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
 6 ATTORNEYS’ EYES ONLY” pursuant to paragraphs 7.2(c) and 7.3(c) first must make a written
 7 request to the Designating Party that (1) identifies the general categories of “CONFIDENTIAL” or
 8 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information that the Receiving Party
 9 seeks permission to disclose to the Expert, (2) sets forth the full name of the Expert and the city and
 10 state of his or her primary residence, (3) attaches a copy of the Expert’s current resume, (4) identifies
 11 the Expert’s current employer(s), (5) identifies each person or entity from whom the Expert has
 12 received compensation or funding for work in his or her areas of expertise or to whom the expert has
 13 provided professional services, including in connection with a litigation, at any time during the
 14 preceding five years,⁷ and (6) identifies (by name and number of the case, filing date, and location of
 15 court) any litigation in connection with which the Expert has offered expert testimony, including
 16 through a declaration, report, or testimony at a deposition or trial, during the preceding five years.⁸

17 (b) A Party that makes a request and provides the information specified in the
 18 preceding respective paragraphs may disclose the subject Protected Material to the identified Expert
 19 unless, within 14 days of delivering the request, the Party receives a written objection from the
 20 Designating Party. Any such objection must set forth in detail the grounds on which it is based.

21 (c) A Party that receives a timely written objection must meet and confer with the
 22 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by agreement
 23 within seven days of the written objection. If no agreement is reached, the Party seeking to make the

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 25 ⁷ If the Expert believes any of this information is subject to a confidentiality obligation to a third-party, then the Expert
 26 should provide whatever information the Expert believes can be disclosed without violating any confidentiality
 27 agreements, and the Party seeking to disclose to the Expert shall be available to meet and confer with the Designating
 28 Party regarding any such engagement.

⁸ It may be appropriate in certain circumstances to restrict the Expert from undertaking certain limited work prior to the
 27 termination of the litigation that could foreseeably result in an improper use of the Designating Party’s “HIGHLY
 28 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information.

1 disclosure to the Expert may file a motion as provided in Civil Local Rule 7 (and in compliance with
 2 Civil Local Rule 79-5, if applicable) seeking permission from the court to do so. Any such motion
 3 must describe the circumstances with specificity, set forth in detail the reasons why the disclosure to
 4 the Expert is reasonably necessary, assess the risk of harm that the disclosure would entail, and
 5 suggest any additional means that could be used to reduce that risk. In addition, any such motion
 6 must be accompanied by a competent declaration describing the parties' efforts to resolve the matter
 7 by agreement (i.e., the extent and the content of the meet and confer discussions) and setting forth
 8 the reasons advanced by the Designating Party for its refusal to approve the disclosure.

9 In any such proceeding, the Party opposing disclosure to the Expert shall bear the
 10 burden of proving that the risk of harm that the disclosure would entail (under the safeguards
 11 proposed) outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

12 Experts previously disclosed by either party pursuant to the previous stipulated
 13 protective order and not timely objected to thereunder shall be deemed approved under this Section,
 14 such that disclosure of that expert need not be repeated.

15 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
 16 OTHER LITIGATION

17 If a Party is served with a subpoena or a court order issued in other litigation that
 18 compels disclosure of any information or items designated in this action as "CONFIDENTIAL" or
 19 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" that Party must:

20 (a) promptly notify in writing the Designating Party. Such notification shall
 21 include a copy of the subpoena or court order;

22 (b) promptly notify in writing the party who caused the subpoena or order to issue
 23 in the other litigation that some or all of the material covered by the subpoena or order is subject to
 24 this Protective Order. Such notification shall include a copy of this Stipulated Protective Order; and

25 (c) cooperate with respect to all reasonable procedures sought to be pursued by
 26 the Designating Party whose Protected Material may be affected.⁹

27 ⁹ The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to
 28 afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court from

If the Designating Party timely seeks a protective order, the Party served with the subpoena or court order shall not produce any information designated in this action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” before a determination by the court from which the subpoena or order issued, unless the Party has obtained the Designating Party’s permission. The Designating Party shall bear the burden and expense of seeking protection in that court of its confidential material – and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN
 10 THIS LITIGATION

11 (a) The terms of this Order are applicable to information produced by a Non-
 12 Party in this action and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
 13 ATTORNEYS’ EYES ONLY”. Such information produced by Non-Parties in connection with this
 14 litigation is protected by the remedies and relief provided by this Order. Nothing in these provisions
 15 should be construed as prohibiting a Non-Party from seeking additional protections.

16 (b) In the event that a Party is required, by a valid discovery request, to produce a
 17 Non-Party’s confidential information in its possession, and the Party is subject to an agreement with
 18 the Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

19 (1) promptly notify in writing the Requesting Party and the Non-Party that
 20 some or all of the information requested is subject to a confidentiality agreement with a Non-Party;

21 (2) promptly provide the Non-Party with a copy of the Stipulated
 22 Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific
 23 description of the information requested; and

24 (3) make the information requested available for inspection by the Non-
 25 Party.

26
 27 which the subpoena or order issued.
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(c) If the Non-Party fails to object or seek a protective order from this court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party's confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the court.¹⁰ Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its Protected Material.

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
PROTECTED MATERIAL

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B).¹¹ This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a

¹⁰ The purpose of this provision is to alert the interested parties to the existence of confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality interests in this court.

¹¹ If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return or destroy the specified information and any copies it has and may not sequester, use or disclose the information until the claim is resolved. This includes a restriction against presenting the information to the court for a determination of the claim. Documents previously reviewed and produced by either party pursuant to the previous stipulated protective order need not be re-reviewed for privilege.

1 communication or information covered by the attorney-client privilege or work product protection,
 2 the parties may incorporate their agreement in the stipulated protective order submitted to the court.

3 12. MISCELLANEOUS

4 12.1 Right to Further Relief. Nothing in this Order abridges the right of any
 5 person to seek its modification by the court in the future.

6 12.2 Right to Assert Other Objections. By stipulating to the entry of this
 7 Protective Order no Party waives any right it otherwise would have to object to disclosing or
 8 producing any information or item on any ground not addressed in this Stipulated Protective Order.
 9 Similarly, no Party waives any right to object on any ground to use in evidence of any of the material
 10 covered by this Protective Order.

11 12.3 Export Control. Disclosure of Protected Material shall be subject to all
 12 applicable laws and regulations relating to the export of technical data contained in such Protected
 13 Material, including the release of such technical data to foreign persons or nationals in the United
 14 States or elsewhere. The Producing Party shall be responsible for identifying any such controlled
 15 technical data, and the Receiving Party shall take measures necessary to ensure compliance.

16 12.4 Filing Protected Material. Without written permission from the Designating
 17 Party or a court order secured after appropriate notice to all interested persons, a Party may not file
 18 in the public record in this action any Protected Material. A Party that seeks to file under seal any
 19 Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed
 20 under seal pursuant to a court order authorizing the sealing of the specific Protected Material at
 21 issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing
 22 that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled to
 23 protection under the law. If a Receiving Party's request to file Protected Material under seal
 24 pursuant to Civil Local Rule 79-5(d) is denied by the court, then the Receiving Party may file the
 25 Protected Material in the public record pursuant to Civil Local Rule 79-5(e) unless otherwise
 26 instructed by the court.

27 13. FINAL DISPOSITION

28 Within 60 days after the final disposition of this action, as defined in paragraph 4,

1 each Receiving Party must return all Protected Material to the Producing Party or destroy such
2 material. As used in this subdivision, “all Protected Material” includes all copies, abstracts,
3 compilations, summaries, and any other format reproducing or capturing any of the Protected
4 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must submit
5 a written certification to the Producing Party (and, if not the same person or entity, to the
6 Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all the
7 Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has not
8 retained any copies, abstracts, compilations, summaries or any other format reproducing or capturing
9 any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an
10 archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal
11 memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work product, and
12 consultant and expert work product, even if such materials contain Protected Material. Any such
13 archival copies that contain or constitute Protected Material remain subject to this Protective Order
14 as set forth in Section 4 (DURATION).

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1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 Respectfully submitted,

3 Dated: December 1, 2010

Dated: December 1, 2010

4
5 /s/ M. Patricia Thayer
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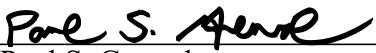
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29 Attorneys for Plaintiff
30 GENENTECH, INC.

31 PURSUANT TO STIPULATION, IT IS SO ORDERED

32 DATED: December 6, 2010


33 Paul S. Grewal
34 United States Magistrate Judge

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of
4 _____ [print or type full address], declare under penalty of perjury that I have read
5 in its entirety and understand the Stipulated Protective Order that was issued by the United States
6 District Court for the Northern District of California on _____ in the case of *Genentech, Inc. v.*
7 *The Trustees of the University of Pennsylvania*, Case No. 5:10-CV-2037-LHK-PVT. I agree to
8 comply with and to be bound by all the terms of this Stipulated Protective Order and I understand
9 and acknowledge that failure to so comply could expose me to sanctions and punishment in the
10 nature of contempt. I solemnly promise that I will not disclose in any manner any information or
11 item that is subject to this Stipulated Protective Order to any person or entity except in strict
12 compliance with the provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for the
14 Northern District of California for the purpose of enforcing the terms of this Stipulated Protective
15 Order, even if such enforcement proceedings occur after termination of this action.

16 I hereby appoint _____ [print or type full name] of
17 _____ [print or type full address and telephone
18 number] as my California agent for service of process in connection with this action or any
19 proceedings related to enforcement of this Stipulated Protective Order.

20 Date: _____

21 City and State where sworn and signed: _____

22 Printed name: _____
23 [printed name]

24 Signature: _____
25 [signature]